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IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1967

## No. 1013

IN THE MATTER OF THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH," ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a, "JABO," FOR A WRIT OF CERTIORARI.

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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# United States Court of Appeals

FOR THE THIRD CIRCUIT

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Nos. 16360 to 16363

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IN THE MATTER OF

THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH", ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a "JABO", FOR A WRIT OF HABEAS CORPUS.

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## SUR PETITION FOR REHEARING

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Present: STALEY, *Chief Judge*, and McLAUGHLIN, KALODNER, HASTIE, FORMAN, FREEDMAN, SEITZ, VAN DUSEN, *Circuit Judges*.

THE PETITION FOR REHEARING FILED BY

FRANCIS HUTCHINS, a/k/a "HUTCH", Appellant in No. 16360

ULYSSES WALLS, Appellant in No. 16361

NORMAN PRINCE, Appellant in No. 16362

ERNEST HERNDON, a/k/a "JABO", Appellant in No. 16363.

in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

McLAUGHLIN, *Judge*.

Dated: December 14, 1967.

# United States Court of Appeals

FOR THE THIRD CIRCUIT

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NOS. 16360 TO 16363

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IN THE MATTER OF

THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH", ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a "JABO", FOR A WRIT OF HABEAS CORPUS.

FRANCIS HUTCHINS, a/k/a "HUTCH", Appellant in No. 16360

ULYSSES WALLS, Appellant in No. 16361

NORMAN PRINCE, Appellant in No. 16362

ERNEST HERNDON, a/k/a "JABO", Appellant in No. 16363

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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Argued September 28, 1967

Before McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges.*

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## OPINION OF THE COURT

(Filed October 31, 1967)

PER CURIAM.

This is an appeal from the denial of a writ of habeas corpus by the United States District Court for the District of New Jersey upon the application of Francis Hutchins, Ulysses Walls, Norman Prince and Ernest Herndon. It is

based chiefly on the contention that evidence was erroneously admitted against them in their trial for conspiracy in the Bergen County Court (New Jersey) because it was the tainted product of a search of the person of Mr. Prince made incidental to his arrest without a warrant. This argument was advanced unsuccessfully in the New Jersey Courts.[1] In the United States District Court it was also urged that should the arrest be deemed lawful the search was invalidated because Mr. Prince was not properly arraigned before the nearest magistrate pursuant to the New Jersey Rules of Criminal Practice.[2]

We have reviewed the record and agree with the conclusions reached by Judge Augelli in his Memorandum and Order[3] that neither the search and arrest of Mr. Prince nor the failure to arraign him in strict compliance with the New Jersey Rules of Criminal Practice were violative of his federal constitutional rights.

The order of the District Court denying the writ of habeas corpus, filed November 2, 1966, will be affirmed.

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1 State v. Hutchins, 43 N.J. 85 (1964), *aff'd after remand*, 44 N.J. 49 (1965).

2 N.J.R.R. 3:2-3(a).

3 In the Matter of the Application of Francis Hutchins, a/k/a "HUTCH", Ulysses Walls, Norman Prince and Ernest Herndon, a/k/a "Jabo", Civil No. 346-66 (D.N.J., filed Nov. 2, 1966).

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

# United States Court of Appeals

FOR THE THIRD CIRCUIT

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NOS. 16360 TO 16363, INCLUSIVE

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IN THE MATTER OF

THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH", ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a "JABO",

FRANCIS HUTCHINS, a/k/a "HUTCH", Appellant in No. 16360

ULYSSES WALLS, Appellant in No. 16361

NORMAN PRINCE, Appellant in No. 16362

ERNEST HERNDON, a/k/a as "JABO", Appellant in No. 16363

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(D. C. Civil Action No. 346-66)

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

---

Present: McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges.*

---

## JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed November 2, 1966, be, and the same is hereby affirmed, with costs.

Attest:

THOMAS F. QUINN, *Clerk.*

October 31, 1967.

# United States District Court

DISTRICT OF NEW JERSEY

In the Matter of the Application of FRANCIS HUTCHINS, a/k/a "Hutch", ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a "Jabo", for a Writ of Habeas Corpus.

Civil Action No. 346-66.

## MEMORANDUM AND ORDER

AUGELLI, *District Judge*:

This is a second application for habeas corpus relief in this matter. In the first application, filed March 3, 1965, petitioners alleged a violation of their federal constitutional rights in several particulars. Briefly stated, these centered around the lawfulness of the arrest of petitioner Prince, the search and seizure made in connection therewith, the use of the seized material as evidence in the case, and the trial judge's comment to the jury on the failure of petitioner Herndon to testify.* It was contended that these alleged errors vitiated the guilty verdice returned by the jury against all petitioners.

On the first application, this Court considered only the claim of error based on the trial judge's comment on Herndon's failure to take the witness stand. As to this, petitioners contended that the refusal of the Supreme Court of

* Petitioners were sentenced on November 2, 1962, following their conviction by a jury on a charge of conspiracy to conduct a lottery in violation of N.J.S.A. 2A:98-1 and 2. The trial judge's comment regarding Herndon's failure to testify was permissible under New Jersey law as understood and applied at the time of the trial of this case in 1962. *State* v. *Corby*, 28 N.J. 106 (1958).

New Jersey to retrospectively apply to the facts of this case the rule of *Malloy* v. *Hogan*, 378 U. S. 1, resulted in a deprivation of rights secured to them by the Fifth and Fourteenth Amendments.

This case was first argued before the State Supreme Court on April 24, 1964. That Court's opinion, filed July 7, 1964, decided all questions involved in the appeal except one pertaining to the lawfulness of Prince's arrest and the search and seizure made in connection therewith. On this sole issue, the case was remanded to the trial court for further proceedings, the remand order providing that "jurisdiction of the cause be retained in this court." *State* v. *Hutchins*, 43 N. J. 85 (1964). The trial judge took testimony on the remanded issue, made his determination, and filed a transcript of the hearing with the State Supreme Court. Argument before that Court on the remanded issue was heard on January 5, 1965. It was then that petitioners, for the first time, sought to invoke the ruling of *Malloy* v. *Hogan*, supra, which had been decided on June 15, 1964.

In a per curiam opinion filed on February 11, 1965, the State Supreme Court expressed agreement with the trial judge's finding on remand that the arrest of Prince was lawful, noted that this disposed of all issues on the appeal, and affirmed the convictions of petitioners. *State* v. *Hutchins*, 44 N. J. 49 (1965). As to *Malloy*, the Court said:

> "All defendants raise another issue which was not before us at the original argument. They contend that the United States Supreme Court in *Malloy* v. *Hogan*, 378 U. S. 1, 84 *S. Ct.* 1489, 12 *L. Ed. 2nd* 653 (1964), decided after that argument, has made any comment by a trial judge of a defendant's failure to testify in his own defense a violation of the defendant's Fifth and Fourteenth Amendments rights. Herndon was the only defendant who did not take the stand. Defendants argue that the trial court's comment on the failure of Herndon to testify was reversable error as to all of them. The issue is not before us, for, as stated above,

we concluded on the first appeal all issues except the one embraced by the remand."

It was following this determination that petitioners first applied to this Court for federal habeas corpus relief. Shortly thereafter, on April 28, 1965, the Supreme Court of the United States decided *Griffin* v. *California*, 380 U. S. 609. That case held that adverse comment concerning failure of a defendant to testify in a State criminal trial violated the self-incrimination clause of the Fifth Amendment which, in *Malloy*, had been made applicable to the States by the Fourteenth Amendment. However, neither *Malloy* nor *Griffin* furnished clear guidance as to whether the rules enunciated by those cases should be given retrospective as well as prospective effect. Under the circumstances, and for the reasons set forth in this Court's Opinion and Order filed May 18, 1965, in Civil Action No. 221-65, the petition filed herein on March 3, 1965, was dismissed without prejudice in order to enable petitioners to seek post-conviction relief in light of *Griffin*, and thus give the State Courts an opportunity, in the first instance, to pass upon the question of whether *Griffin* should be given retrospective application.

Parenthetically, it may be noted that while *Malloy* extended to the States, by way of the Fourteenth Amendment, the Fifth Amendment privilege against self-incrimination, it did not directly involve the question of adverse comment on a defendant's failure to testify in a State criminal trial. The rule prohibiting such comment was not articulated until *Griffin* was decided on April 28, 1965. In *State* v. *Johnson*, 43 N. J. 572, decided January 19, 1965, the State Supreme Court, at page 591, stated, "* * * we express no opinion as to whether *Malloy* forbids comment by the prosecutor or the court on defendants' failure to testify. Nor do we express an opinion whether, if *Malloy* does forbid such comment, that rule should be applied retroactively in a collateral proceeding under circumstances other than those in this case."

The post-conviction route followed by petitioners after the dismissal of their petition by this Court, again brought them before the State Supreme Court. The matter was argued on January 10, 1966. On January 19, 1966, the Supreme Court of the United States decided *Tehan* v. *Shott*, 382 U. S. 406. That case held, that except for cases still pending on direct appeal or review at the time *Griffin* was announced on April 28, 1965, the *Griffin* rule need not be given retrospective application. See also, *United States* v. *Pate*, 357 F. 2d 911 (7 Cir. 1966); *United States* v. *Follette*, 358 F. 2d 922 (2 Cir. 1966); *Mordecai* v. *United States*, 252 F. Supp. 694 (D. Col. 1966). In a per curiam opinion filed on March 7, 1966, *State* v. *Hutchins*, 46 N. J. 439, the State Supreme Court again denied petitioners' claim for relief. Commenting upon *Tehan*, which had not been decided when the matter was argued on January 10, 1966, the Court said:

> "* * * we think that *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 86 *S. Ct.* 459, 15 *L. Ed 2nd* 453 (Jan. 19, 1966), which deals with the problem of retrospective application of *Griffin* does not require that any of our judgments, which defendants did not seek to review directly, should be undone upon this collateral attack."

It was after this decision was handed down that petitioners filed their second application for habeas corpus relief in this Court. Unless it can be said that petitioners' case was still pending on direct review on April 28, 1965, the date *Griffin* was announced, *Tehan* does not require a retrospective application of the *Griffin* rule. It is obvious that petitioners' case was not pending on direct review in the State courts on April 28, 1965. As previously mentioned, the State Supreme Court, on February 11, 1965, had disposed of the reserved issue dealing with the arrest of Prince, and affirmed the judgments of conviction of all petitioners. As was stated by the Court, at 46 N. J. 442:

> "* * * it would not be in the public interest to undo on collateral attack judgments of conviction the finality of which was realistically settled long before *Griffin*. The values which *Griffin* seeks affirmatively to sustain for the future do not call for a renewal of this extended litigation as to all or any of these defendants."

Based on the *Griffin* date of April 28, 1965, which this Court finds is controlling here, it is clear that petitioners are not entitled to have the *Griffin* rule applied retrospectively to this case.

Consideration will now be given to the contentions made with respect to the alleged unlawfulness of Prince's arrest, the search and seizure made in connection therewith, and the use of the seized material as evidence in the trial of the case.

Petitioners were indicted, with two others not involved herein, for conspiring with one Peter Foti, who was not named as a defendant, to conduct a lottery in Englewood, New Jersey, between January 1, 1959 and April 10, 1962. Foti was the State's chief witness, and he testified in detail concerning the involvement of petitioners in the crime charged in the indictment.

Foti was arrested on April 4, 1962, at his gocery store in Englewood. Thereafter, he told the police about his association with petitioners in the illegal operation of "writing the numbers," the modus operandi that was followed in carrying out this activity, and the participation of petitioners therein. During the period that this operation was being conducted, the slips representing the daily play were first collected from Foti by petitioner Wall, and thereafter, at different subsequent intervals, successively by petitioners Herndon, Hutchins and Prince.

On April 10, 1962, at about 11:00 o'clock in the morning, Prince was arrested as he was about to enter his home. The arrest was effected by two assistant prosecutors of Bergen

County, George Gelman and Anthony Andora. These men exhibited to Prince what he said was described to him as a "search warrant and arrest warrant." Prince invited Gelman and Andora into his home. A search of the premises was made, but nothing was obtained as a result thereof. However, a search of Prince's person, following a direction that he empty his pockets, produced cash totalling $752.24, some personal business cards, and a wallet. These items were admitted in evidence against Prince at the trial over his objection that they had been seized pursuant to an improperly issued search warrant.

When the appeal in this case reached the State Supreme Court, that tribunal agreed with the conclusion reached by the Appellate Division that if the evidence taken from Prince rested upon the validity of the search warrant, such evidence should have been suppressed because the warrant was issued without a sufficient showing of probable cause. However, the State Supreme Court was satisfied, on the basis of the record before it, "* * * that Foti's statement to the police upon his arrest on April 4, 1962 implicating Prince constituted probable cause for arrest of Prince without a warrant." But The Court posed the question as to whether the search of Prince's person was incidental to an arrest, and observed in this connection that it was unimportant whether the search was made before or after the arrest so long as there was an intent to arrest regardless of the outcome of the search. Since the record did not permit a resolution of this issue, the matter was remanded to the trial court for a determination thereof.

On August 20, 1964, the trial judge took testimony on the remanded issue and found that "* * * the search of the person of Prince, the requirement in the house that he empty his pockets, was incidental to his arrest and not a search under the search warrant; that the defendant Prince's arrest was predetermined by the Prosecutor and the mission of the Assistant Prosecutor to the Prince residence was the arrest of Prince; that it was the intent of

the Prosecutor and the Assistant Prosecutors assigned to the case to arrest Prince regardless of the search, regardless of the outcome of the search, on the information with respect to his involvement in the offense obtained from Foti; and further, that the arrest had been determined prior to the disclosure resulting from the search warrant and not after or resulting from the disclosure obtained under the search warrant."

In a per curiam opinion filed February 11, 1965, *State* v. *Hutchins,* 44 N. J. 49, the State Supreme Court agreed with the findings of the trial judge on the remanded issue, and stated that "[t]he trial court conducted a full hearing and found that the arrest of Prince was not based upon the product of a search but was made pursuant to a pre-existing intent of an arresting officer to take Prince into custody. We agree. This disposes of the only reserved issue."

Petitioners vigorously attack the lawfulness of Prince's arrest, which was effected without a warrant, and the existence of probable cause therefor. They challenge, as an afterthought on the part of the State, the assertion that there was a pre-existing intent to arrest Prince regardless of the outcome of the search that was made. Petitioners also question the sufficiency of the findings made by the trial judge of this issue on remand, and the "pro forma" approval of such findings by the State Supreme Court.

It is not disputed that a lawful arrest may be made without a warrant if there is probable cause therefor, that a search of the person and seizure of incriminating evidence may be made as an incident to such lawful arrest, and that evidence so obtained is admissible in evidence at the trial of such person. *United States* v. *Carlson,* 359 F. 2d 592 (3 Cir. 1966). See also, *State* v. *Doyle,* 42 N. J. 334, 342 (1964).

With the guidelines of *Townsend* v. *Sain,* 372 U. S. 293 (1963) in mind, this Court has made an independent study of the State Court record. The factual determination of the

lawfulness of Prince's arrest is amply supported by the record. The trial judge, on this issue, heard the testimony of the arresting officers, Gelman and Andora, as well as that of petitioner Prince. Gelman testified that as a result of information obtained from Foti on April 4, 1962, in the form of a sworn statement involving Prince in the illegal activity, he maintained a surveillance on the movements of Prince, reported his observations to his superior, the Prosecutor of Bergen County, and received from him instructions to arrest Prince. Pursuant to these instructions, and accompanied by Andora, the arrest of Prince was made on April 10, 1962. The witness was definite in his testimony that when he approached Prince as the latter was about to enter his home, he told Prince that he was under arrest. Gelman also testified that he made up his mind to arrest Prince "about the day before the arrest was made," and that he did not secure an arrest warrant because "I didn't feel that I needed a warrant to arrest him [Prince] based upon the information which I had * * *." There was further testimony by Gelman that after the arrest was made, he prepared a complaint against Prince and appeared for the State at Prince's arraignment before Judge Dalton on April 10, 1962.

On direct examination, Prince denied that Gelman used any language to indicate that an arrest was being made. Prince's recollection being that reference was only made to a search warrant, and that it was not until he was brought to the Prosecutor's Office by Gelman and Andora that he was told he was under arrest. However, on cross-examination, Prince admitted that when Gelman approached and confronted him, the word "arrest" was used. But he said the word "arrest" was used in a context that indicated the existence of an arrest warrant.

It is obvious that the conflicting stories told by Gelman and Prince raised an issue of credibility. The resolution of this factual issue by the trial judge in favor of the State, and the approval thereof by the State Supreme Court, being

fairly supported by the record, will not be disturbed by this Court. *Townsend* v. *Sain,* supra. From the record as a whole, this Court is satisfied that proper constitutional standards were applied in determining the lawfulness of Prince's arrest, the search and seizure made in connection therewith, and the use made of the seized material at the trial. See *United States* v. *Carlson,* supra; *Agnello* v. *United States,* 269 U. S. 20 (1925); *Harris* v. *United States,* 331 U. S. 145 (1947); *Draper* v. *United States,* 358 U. S. 307 (1959).

A further argument advanced by petitioners is that Prince's arrest, if otherwise lawful, became unlawful *ab initio* because he was not brought before a magistrate without unnecessary delay as required by R. R. 3:2-3(a) of the New Jersey Rules of Criminal Practice. The pertinent part of the cited Rule provides that "[a] person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith."

The record shows that after Prince was arrested on April 10, 1962, a warrant for his commitment, based on a complaint charging Prince with a violation of N.J.S.A. 2A:98-1 and 2, and also N.J.S.A. 2A:121-3, was issued by Judge Dalton of the Bergen County District Court, in which bail was noted to be fixed at $15,000.00. On the following day, April 11, Prince, in writing, agreed to waive arraignment and a preliminary hearing on the charges preferred against him.

Even if it be assumed as contended by petitioners, that there was a violation of R. R. 3:2-3(a), such violation, without more, does not spell out the violation of any of Prince's federally protected rights. There is absolutely no showing that Prince was prejudiced by the action taken by the local authorities in connection with the alleged failure to arraign Prince "without unnecessary delay." The rule

of *McNabb* v. *United States,* 318 U. S. 332 (1943) and *Mallory* v. *United States,* 354 U. S. 449 (1957) which requires in federal criminal proceedings, an arraignment without unnecessary delay, is not of constitutional dimension. It is applicable only to federal law enforcement officers. *United States* v. *State of New Jersey,* 332 F. 2d 810 (3 Cir. 1963); *United States* v. *Carlson,* supra.

This Court is satisfied that none of the petitioners have been deprived of any federal constitutional rights in the particulars alleged, and that their application for a writ of habeas corpus should be denied. At the time of the filing of their petition, petitioners prayed that in the event this Court should deny relief, that certificate of probable cause issue pursuant to 28 U.S.C.A. §2253. In view of the disposition made of this matter, and the fact that two of the petitioners face short 30 day sentences, the Court feels that a certificate of probable cause should issue. Because of the short 30 day sentences and the uncertainty surrounding the retrospective application of *Griffin* prior to *Tehan,* this Court, after petitioners had been taken into State custody, admitted them to bail pending a determination of their application for federal habeas corpus relief. *Johnston* v. *Marsh,* 227 F. 2d 528 (3 Cir. 1955).

It is therefore, on this 2nd day of November, 1966,

ORDERED, That the petition of Francis Hutchins, a/k/a "Hutch", Ulysses Walls, Norman Prince, and Ernest Herndon, a/k/a "Jabo", for a writ of habeas corpus be, and the same hereby is, denied; and it is further

ORDERED, That the application of said petitioners for a certificate of probable cause be, and the same hereby is, granted; and it is further

ORDERED, That the present bail of petitioners be continued pending disposition made of this matter by the Court of Appeals.

ANTHONY T. AUGELLI,
*United States District Judge.*

The Clerk of this Court will please mark as court exhibits in this case, the following items furnished by the Prosecutor of Bergen County: transcript of hearing on remand from the Supreme Court dated August 20, 1964; brief and appendix in support of findings of fact and law in the County Court filed with the Supreme Court; supplemental brief filed with the Supreme Court in the same matter on January 25, 1965; photostatic copies of letters dated September 10, 1963, September 24, 1963, September 26, 1963, October 1, 1963, May 26, 1964, and May 27, 1964; transcript of statement of Norman D. Prince taken on April 10, 1962; copy of unreported opinion of the Appellate Division filed November 13, 1963; brief and appendix in the Appellate Division on behalf of petitioners; brief and appendix in the Appellate Division on behalf of the State of New Jersey; and brief of the State of New Jersey filed with the Supreme Court. The Clerk will also mark as court exhibits the following items furnished by petitioners: order on remand filed July 7, 1964; brief in the Supreme Court on behalf of petitioners; supplemental brief in the Supreme Court on behalf of petitioners; and answer to supplemental brief of Prosecutor filed in the Supreme Court.

ANTHONY T. AUGELLI,
*United States District Judge.*